MOTION FILED

NOV 15 1999

(3)

No. 99-434

IN THE

Supreme Court of the United States

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NOV 15 1999

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SUPREME COURT, U.S.

WAL-MART STORES, INC.,
Petitioner,

v.

DANCO, INC. AND BENJAMIN GUILIANI,
Respondents.

On Petition for a Writ Of Certiorari To The United States Court of Appeals for the First Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* AND BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES, THE FOOD MARKETING INSTITUTE, AND THE INTERNATIONAL MASS RETAIL ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN MAHALLATI KYSELA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
The Chamber of Commerce
of the United States of America

WILLIAM F. SHEEHAN
(Counsel of Record)
MATTHEW M. HOFFMAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for *Amici Curiae*

(Additional counsel listed on inside cover)

November 15, 1999

18 pp

ADDITIONAL COUNSEL

S. LAWRENCE KOCOT
DON L. BELL
THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES
413 North Lee Street
Alexandria, VA 22314

Attorneys for *Amicus Curiae*
The National Association of Chain Drug Stores

GEORGE GREEN
FOOD MARKETING INSTITUTE
655 15th Street, N.W.
Washington, D.C. 20005

Counsel for *Amicus Curiae*
Food Marketing Institute

ROBERT J. VERDISCO
MORRISON G. CAIN
INTERNATIONAL MASS RETAIL ASSOCIATION
1170 North Moore Street
Suite 2250
Arlington, VA 22209

Attorneys for *Amicus Curiae*
International Mass Retail Association

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The Chamber of Commerce of the United States of America, the National Association of Chain Drug Stores, the Food Marketing Institute, and the International Mass Retail Association, having been unable to secure the consent of the respondents, respectively move the Court under Sup. Ct. R. 37.2(b) for leave to file the attached brief *amici curiae* in support of the petition for a writ of certiorari in this case.

The Chamber of Commerce of the United States of America

("the Chamber") is the world's largest business federation. The Chamber represents an underlying membership of more than two and a half million businesses and organizations of every size, in every sector and region. An important function of the Chamber is to represent the interests of its members in court on issues of national concern to the American business community. Accordingly, the Chamber has participated as *amicus curiae* in several hundred cases before the Court, including several major employment law cases that have addressed key issues regarding the application of Title VII of the Civil Rights Act of 1964 and other federal statutes. *See, e.g.*, *Kolstad* v. *American Dental Ass'n*, 119 S. Ct. 2118 (1999); *Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742 (1998); *Faragher* v. *City of Boca Raton*, 524 U.S. 775 (1998); *Ingersoll-Rand Co.* v. *McClendon*, 498 U.S. 133 (1990); and *Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57 (1986).

The National Association of Chain Drug Stores ("NACDS") is a trade association whose membership consists of 136 retail chain community pharmacy companies. Collectively, chain community pharmacy comprises the largest component of pharmacy practice with over 97,000 pharmacists. The chain community pharmacy industry is comprised of more than 19,000 traditional chain drug stores, 7,000 supermarket pharmacies, and nearly 5,000 mass merchant pharmacies. The NACDS membership base operates more than 31,000 retail community pharmacies with annual sales totaling over $158 billion, including prescription drugs, over-the-counter medications, and health and beauty aids. Chain operated community retail pharmacies fill over 60% of the more than 2.73 billion prescriptions dispensed annually in the United States. Additionally, NACDS membership includes nearly 1,400 suppliers of goods and services to chain community pharmacies. The international membership of NACDS includes 105 members from 26 countries.

The Food Marketing Institute ("FMI") is a nonprofit association whose membership includes some 1,500 food retailers and wholesalers and their customers in the United States and

throughout the world. FMI's activities include programs in research, education, industry relations, and public affairs on behalf of its members and their subsidiaries. FMI's domestic member companies operate approximately 21,000 retail food stores with a combined annual sales volume of $225 billion — more than half of all grocery store sales in the United States. The retail membership is composed of large multi-store chains, small regional firms, and independent supermarkets. FMI's international membership includes 200 members from 60 countries.

The International Mass Retail Association ("IMRA") is an alliance of retailers and their product and service suppliers committed to bringing price-competitive value to the world's consumers. IMRA improves its members' businesses by providing industry research and education, government advocacy, and a unique forum for its members to establish relationships, solve problems, and work together for the benefit of the consumer and the mass retail industry. Collectively, IMRA's more than 200 retail companies operate more than 133,000 stores worldwide and have sales of over $450 billion annually. IMRA also represents over 600 supplier companies with sales totaling over $600 billion per year. Together, IMRA's membership represents over $1 trillion in annual sales and employs millions of workers.

As the foregoing demonstrates, the *amici* represent a broad range of commercial and business interests in the United States. Their members regularly do business with independent contractors and other business organizations whose employees may work on their premises. As a result, *amici* have a keen interest in the issue presented by this case. If the First Circuit's decision is permitted to stand, the companies that *amici* represent face a wave of new litigation from businesses claiming that they and/or their employees have been injured as a result of exposure to a hostile work environment. *Amici* believe that such claims are fundamentally inconsistent with the principles of hostile environment liability enunciated by this Court. Nonetheless, if *amici's* members are to be exposed to such claims, at the very

least they should receive timely and definitive guidance from this Court so that they may structure their activities to comply with the law and avoid unnecessary risks of liability.

The attached brief supplements rather than duplicates the petition. It demonstrates that, because the hostile workplace environment theory is designed to protect employees' emotional and mental well-being, attributes typically not possessed by business entities such as independent contractors, Congress could not have intended to spawn the amount and kind of business litigation invited by the First Circuit's construction of 42 U.S.C. § 1981. In addition, the brief documents the tremendous growth over the last decade of "outsourcing" by American businesses of a variety of services that were previously performed in house but are now performed by outside contractors, often with employees working on the premises of the contracting company. *Amici* believe that the discussion of these issues may assist the Court in its disposition of the petition.

For the foregoing reasons, the motion for leave to file the attached brief should be granted.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN MAHALLATI KYSELA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
The Chamber of Commerce
of the United States of
America

WILLIAM F. SHEEHAN
(Counsel of Record)
MATTHEW M. HOFFMAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for *Amici Curiae*

S. LAWRENCE KOCOT
DON L. BELL
THE NATIONAL ASSOCIATION OF CHAIN DRUG STORES
413 North Lee Street
Alexandria, VA 22314

Attorneys for *Amicus Curiae* The National Association of Chain Drug Stores

ROBERT J. VERDISCO
MORRISON G. CAIN
INTERNATIONAL MASS RETAIL ASSOCIATION
1170 North Moore Street
Suite 2250
Arlington, VA 22209

Attorneys for *Amicus Curiae* International Mass Retail Association

GEORGE GREEN
FOOD MARKETING INSTITUTE
655 15th Street, N.W.
Washington, D.C. 20005

Counsel for *Amicus Curiae* Food Marketing Institute

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INTRODUCTION AND SUMMARY

The First Circuit's ruling that independent contractors may bring hostile workplace environment claims under 42 U.S.C. § 1981 has a breathtaking sweep. If allowed to stand, that

[1] No counsel for any party had any role in authoring this brief, and no person other than *amici curiae* made any monetary contribution to its preparation or submission.

decision will obviously mean that large corporations like the petitioner, which outsource many tasks to independent contractors in diverse fields, will face potential claims of a breadth and peculiarity which they (and we believe Congress) never foresaw. It means as well that small businesses across the nation will be subject to the same claims. It also means that even private individuals, who are not employers or operating a business, may have to defend a claim of hostile workplace environment by independent contractors hired to mow the lawn, rewire the basement, or fix the plumbing. And it means that *any* commercial entity—not just independent contractors as that term is commonly understood—whose employees happen to work for some period on the premises of another, including Fortune 500 corporations, law partnerships, and accounting firms, may bring hostile workplace claims against parties with whom they contract. In short, the decision below "open[s] more expansive vistas of litigation." *Harris* v. *Forklift Sys., Inc.*, 510 U.S. 17, 24 (1993) (Scalia, J., concurring).

We believe that Congress did not intend, in amending § 1981, to launch the kind of litigation the decision below invites. We make that point in Part I below. In Part II we urge the Court to grant review even though the case comes before it prior to the development of a clear conflict among the circuits over the meaning of § 1981.

ARGUMENT

I. CONGRESS DID NOT INTEND UNDER § 1981 TO CONFER A CAUSE OF ACTION ON BUSINESSES UNDER THE HOSTILE WORKPLACE ENVIRONMENT THEORY.

Hostile workplace environment claims arose first under Title VII of the Civil Rights Act of 1964, which forbids discrimination in the "terms, conditions, or privileges of employment," on the basis of an individual's "race, color, religion, sex, or national origin." 42 U.S.C. § 2000e-2(a). The contours of a hostile workplace claim—what the plaintiff must prove, how a defendant

may defend—have been painstakingly worked out over the years through numerous court cases and agency proceedings. *See, e.g.*, *Knabe* v. *Boury Corp.*, 114 F.3d 407, 410 (3d Cir. 1997). Those precedents, however, will be only marginally relevant to the cascade of litigation heralded by the decision below.

That is because there is a fundamental difference between a hostile work environment claim brought by an employee and one brought by an independent contractor or other business entity. Employees bring hostile work environment claims to redress psychological and emotional injuries. Business enterprises, however, have no emotions to be damaged, and can only recover for economic losses.

1. Courts have always recognized that the essential element of a hostile work environment claim is injury to the human sprit. The first case to recognize a hostile workplace environment theory was *Rogers* v. *EEOC*, 454 F.2d 234 (5th Cir. 1971). *See Meritor Sav. Bank, FSB* v. *Vinson*, 477 U.S. 57, 65 (1986). *Rogers* involved an action for employment discrimination under Title VII based on the allegation that the employer, a company engaged in optometry, segregated its patients, a practice which aggrieved the employee-claimant. Judge Goldberg wrote that "employees' psychological as well as economic [interests] are statutorily entitled to protection from employer abuse," and that Title VII protects "the emotional and psychological stability of minority group workers." 454 F.2d at 238.

This Court endorsed the view of Title VII as prohibiting a hostile workplace environment in *Meritor*, where it rejected the petitioner's argument that the statute did not reach "'purely psychological aspects of the workplace environment,'" 477 U.S. at 64, and ruled instead that Title VII "affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult." *Id.* at 65.

Subsequent cases have continued to focus on the effect of the alleged discriminatory conduct on the employee's mental well-being and on-the-job attitude. Thus, in *Harris* v. *Forklift Systems,*

Inc., 510 U.S. 17 (1993), while holding that a plaintiff need not prove that the defendants' conduct caused "a tangible psychological injury," the Court also ruled that the plaintiff must demonstrate a work environment "that a reasonable person would find hostile" and that the victim as well "subjectively perceive[s] * * * to be abusive." *Id.* at 21.

Indeed, even the examples given in *Harris* of the kinds of effects short of a psychological breakdown that a hostile environment may produce—diminished job performance, discouragement from staying on the job, and impeded career advancement—reflect adverse psychological impacts stemming principally from the deleterious effects of the hostile environment on the employee's spirit. *Id.* at 22.[2]

Independent contractors and other business organizations, however, have no spirit to be abused and are incapable of experiencing the hallmark indicia of a hostile environment, namely "intimidation, ridicule, and insult." *Meritor*, 477 U.S. at 65; *see also Oncale* v. *Sundowner Offshore Servs., Inc.*, 118 S. Ct. 998, 1001 (1998). This is not to say that a corporation may never suffer racial discrimination actionable under § 1981; it is only to say that the hostile workplace environment theory of a § 1981 violation, which by definition asserts harm to the human spirit, is not available to a corporation.

It may well be that the *employees* of an independent contractor or other business entity could be intimidated, ridiculed, and insulted by the employees of a second firm with which the former had a contract. Indeed, that is the situation of the case at bar. And, under certain circumstances, such as when the two

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[2] Discrimination that actually kept employees from advancing in their jobs would be a core violation of Title VII, actionable without need for resort to a hostile workplace environment claim. *Cf. Burlington Indus., Inc.* v. *Ellerth*, 524 U.S. 742, 761 (1998) ("A tangible employment action constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.")

contracting corporations are treated as a "single employer" or a "joint employer," the employees of the former may have a claim against the second firm under Title VII. *See, e.g., Miller* v. *D.F. Zee's, Inc.*, 31 F. Supp. 2d 792, 805-807 (D. Or. 1998) (citing cases).[3] But those employees have no claim under § 1981, for they have no contract with the second firm. As the First Circuit correctly held in this case, "the employee cannot collect damages on his own behalf" because § 1981 does not provide a claim "to one who is merely *affiliated*—as an owner or employee—with" the independent contractor. Pet. App. 9a-10a.

2. One might offer in response that the "benefits, privileges, terms, and conditions of the contractual relationship" protected against racial discrimination under § 1981 should be read to include a right not to have one's employees subjected to a hostile workplace environment. That is, when the host contracting company's employees racially harass the employees of the visiting contracting company, the latter may sue under § 1981. But that is a big step.

It has been settled at least since *Meritor* that the phrase "terms, conditions or privileges of employment" in Title VII includes the *employee's* right to be free of severe forms of workplace harassment, and it is clear that Congress in amending § 1981 meant for the "'benefits, privileges, terms and conditions of the [*employment*] contractual relationship'" to similarly forbid severe

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[3] Indeed, an "employer" within the meaning of Title VII may be liable for interference with the employment opportunities of individuals it does not directly employ. *See, e.g., Sibley Mem'l Hosp.* v. *Wilson*, 488 F.2d 1338, 1341 (D.C. Cir. 1973) (persons aggrieved under Title VII may include "individuals who do not stand in a direct employment relationship with an employer"); EEOC Enforcement Guidance 915.002 (Dec. 3, 1997), *reprinted in* EEOC Compl. Man. (CCH) ¶ 2172. Thus, for example, where a firm provides one of its employees to work on site for a client, and the client subjects the employee to discrimination—*e.g.*, requests a replacement employee of a different race—the client may be liable to the employee under Title VII, even though it is not a direct employer. *See id.* ¶ 2172, at 2255, example 6.

racial harassment. *E.g.*, H.R. Rep. No. 102-40(I), at 92-93 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 630-31. But it does not follow that Congress also intended to afford business concerns with a new cause of action to be asserted on their own behalf, not on behalf of employees who actually suffer a hostile workplace environment. Rather, given the flood of litigation this new interpretation of § 1981 invites, the novel idea of giving a corporation a cause of action against another based on injury to the spirit of its employees, and the deafening congressional silence on any of these issues, one may reasonably conclude that Congress intended no such thing. *See Chisom* v. *Roemer*, 501 U.S. 380, 396 & n.23 (1991) ("[W]e are convinced that if Congress had such an intent, Congress would have made it explicit in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history * * *.").

Moreover, this new corporate cause of action will differ in material ways from traditional employment discrimination suits, whether under Title VII or § 1981. In the traditional suit the plaintiff employee acts to vindicate personal rights and seeks remedies that will confer personal rewards—restoration to the job, and/or money damages. But the employee may have no personal interest at all in the corporation's suit, especially if, as will frequently be the case, the employee is no longer working on the defendant's premises. But to prove its case the corporate plaintiff will need the employee's participation and testimony, and may require it regardless of the employee's wishes on the matter. Nor is it farfetched to suggest that the employee may feel pressure from the employer to provide helpful testimony.

In addition, it may be expected that corporate hostile workplace claims under § 1981 will become another weapon in what would otherwise be ordinary commercial breach of contract cases. A corporation sued for failure to perform may seek to excuse the failure as the result of the deleterious effects on its employees of a hostile working environment allegedly inflicted on them by the plaintiff's employees. Or a contractor finding that

excessive costs of performance have reduced its profits may blame those costs on a hostile workplace environment and sue to recover them. In none of these cases will the corporation be driven by the interests of the employees whose alleged suffering is the gravamen of the claim. Moreover, although Congress has acted to protect employees who are under the de facto control and dominance of their employers, it should not lightly be assumed that, in amending § 1981, Congress intended to confer a new federal cause of action in commercial disputes between business enterprises that will regularly be evenly matched.

In sum, the decision below was wrongly decided for the fundamental reason that the hostile workplace environment theory is designed to protect employees' emotional and mental well-being, attributes not possessed by business entities, and Congress could not have intended to spawn the amount and kind of business litigation invited by the First Circuit's construction of § 1981.

II. THE COURT SHOULD RESOLVE THE ISSUE NOW.

This case involves "an important question of federal law that has not been, but should be, settled by this Court." Sup. Ct. R. 10(c). Independent contractors play an increasingly important role in the American economy, as both large and small businesses recognize the benefits they can obtain by "outsourcing" tasks that were previously performed by employees in house. Many companies now routinely outsource their requirements concerning payroll and benefits administration, information technology, security, landscaping, custodial and janitorial work, data processing, and cafeteria and food services.

A February 1997 survey by the Bureau of Labor Statistics concluded that about 12.6 million people—one tenth of the American work force—now work in so-called "alternative" arrangements that fall outside the scope of traditional employment relationships. *See* Sharon R. Cohany, *Workers in Alternative Employment Arrangements: A Second Look*, Monthly Lab. Rev.,

Nov. 1998, at 3. This category includes not just traditional self-employed independent contractors, but also on-call workers, workers for temporary help agencies, and workers for "contract companies"—firms that supply workers to another organization under contract.

As of 1996, some 86% of major U.S. corporations outsourced at least some of their services, up from 58% in 1992. John A. Byrne, *Has Outsourcing Gone Too Far?*, Bus. Wk., Apr. 1, 1996, at 26. According to one estimate, by 1996, the outsourcing business had reached $100 billion in size, and was growing by a rate of 20 to 30% a year. *See* Terrence E. Deal & Allan A. Kennedy, *The New Corporate Cultures* 95 (1999). By the year 2000, the size of the industry is expected to reach $282 billion. *Id.* at 96.

There is good reason to believe that these trends will continue into the next century. While not all jobs are equally amenable to outsourcing, businesses have sound economic reasons for outsourcing tasks that are not directly related to their core functions. Outside specialist contractors can frequently provide particular services more efficiently and at a lower cost. *See, e.g.*, James Brian Quinn & Thomas R. Doorley, *Beyond Products: Services-Based Strategy*, Harv. Bus. Rev., Mar.-Apr. 1990, at 58, 65 ("By limiting or shedding activities that provide no strategic advantage, a company can increase the value it delivers to both customers and shareholders and, in the process, lower its costs and investments. Conversely, if a company performs activities that it could buy more effectively, costs tend to balloon, and it loses competitive advantage.").

In short, the application of a hostile work environment theory of discrimination to independent contractors "reach[es] to a problem beyond the academic or the episodic." *Rice* v. *Sioux City Mem'l Park Cemetery, Inc.*, 349 U.S. 70, 74 (1955). As we have shown, the First Circuit's decision dramatically alters the legal landscape, potentially exposing businesses to an entirely new category of claims by independent contractors and contract firms. This Court has previously granted *certiorari* to address important

issues relating to workplace harassment under Title VII, even absent a conflict among the circuits. In *Meritor*, for example, the Court granted review to address "important questions concerning claims of workplace 'sexual harassment' brought under Title VII," even though lower courts had uniformly held that such claims were cognizable. 477 U.S. at 59, 66.[4] Sexual harassment became a subject of considerable importance as increasingly large numbers of women entered the work force. The increased reliance by American business on outsourcing and independent contractors is also a development of significant importance, and deserves similar attention from the Court.

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[4] *See also, e.g., Jones* v. *Alfred H. Mayer Co.*, 392 U.S. 409 (1968) (reviewing the question whether purely private discrimination could violate 42 U.S.C. § 1982, even though the decision below was the only appellate case to have addressed the issue); *Reading Co.* v. *Brown*, 391 U.S. 471, 475 (1968) ("We granted certiorari * * * because the issue is important in the administration of the bankruptcy laws and is one of first impression in this Court."); *American Fed'n of Musicians* v. *Wittstein*, 379 U.S. 171, 175 (1964) ("The question being an important one of first impression under the [Labor Management Reporting and Disclosure Act], we granted certiorari."); *Sheldon* v. *Metro-Goldwyn Pictures Corp.*, 309 U.S. 390, 396-97 (1940) ("In view of the importance of the question, which appears to be one of first impression in the application of the copyright law, we granted certiorari.").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

STEPHEN A. BOKAT
ROBIN S. CONRAD
SUSSAN MAHALLATI KYSELA
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

Attorneys for *Amicus Curiae*
The Chamber of Commerce
of the United States of
America

WILLIAM F. SHEEHAN
(Counsel of Record)
MATTHEW M. HOFFMAN
SHEA & GARDNER
1800 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 828-2000

Counsel for *Amici Curiae*

S. LAWRENCE KOCOT
DON L. BELL
THE NATIONAL ASSOCIATION
OF CHAIN DRUG STORES
413 North Lee Street
Alexandria, VA 22314

Attorneys for *Amicus Curiae*
The National Association of
Chain Drug Stores

ROBERT J. VERDISCO
MORRISON G. CAIN
INTERNATIONAL MASS RETAIL
ASSOCIATION
1170 North Moore Street
Suite 2250
Arlington, VA 22209

Attorneys for *Amicus Curiae*
International Mass Retail
Association

GEORGE GREEN
FOOD MARKETING INSTITUTE
655 15th Street, N.W.
Washington, D.C. 20005

Counsel for *Amicus Curiae*
Food Marketing Institute

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REPLY

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REPLY BRIEF FOR PETITIONER

ROBERT K. RHOADS
RANAE BARTLETT
WAL-MART STORES, INC.
702 S.W. 8th Street
Bentonville, Arkansas 72716
(501) 273-4505

JEFFREY S. SUTTON
Counsel of Record
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

MELANIE P. SARWAL
JONES, DAY, REAVIS & POGUE
2727 North Harwood Street
Dallas, Texas 75201
(214) 220-3939

Counsel for Petitioner

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REPLY BRIEF FOR PETITIONER

After two rounds of briefing, the petition plainly satisfies the customary criteria for granting review. It concerns "an important question of federal law" that has not been decided by this Court. S. Ct. R. 10(c). It implicates a "conflict" in the lower courts regarding the standing of corporations to bring § 1981 and similar claims on behalf of their employees. S. Ct. R. 10(a). And it addresses a question that is recurring in nature, affects a wide range of commercial enterprises and in the end demands prompt resolution—as suggested by the petition and now confirmed by the brief *amici curiae* filed by the United States Chamber of Commerce, the National Association of Drug Stores, The Food Marketing Institute and the International Mass Retail Association. While respondents understandably try to offer several arguments to the contrary, none counters these essential, and we respectfully submit dispositive, points.

1. At no point do respondents raise, or even hint at, a procedural obstacle to reviewing the question presented. Nor could they. From the initial filing of this case to the present, petitioner has been steadfast in contending that 42 U.S.C. § 1981 does not permit independent contractors, as opposed to employees, to bring hostile work environment claims.

2. Respondents also conspicuously fail to rebut the argument (Pet. 21-23) that this federal issue is an important one. Whether one considers the vantage point of large businesses or small ones, sophisticated independent contractors or unsophisticated ones, all have a stake in this issue and all stand to benefit from guidance regarding the appropriate resolution of it. As the *amici curiae* brief filed by the United States Chamber of Commerce, among others, also makes clear, few if any businesses have structured their workplace rules to handle such independent contractor, as opposed to employee, claims.

> [L]arge corporations . . . , which outsource many tasks to independent contractors in diverse fields, will face

> potential claims of a breadth and peculiarity which they (and we believe Congress) never foresaw. . . . [S]mall businesses across the nation will be subject to the same claims. . . . [E]ven private individuals, who are not employers or operating a business, may have to defend a claim of hostile workplace environment by independent contractors hired to mow the lawn, rewire the basement, or fix the plumbing. And it means that *any* commercial entity—not just independent contractors as that term is commonly understood—whose employees happen to work for some period on the premises of another, including Fortune 500 corporations, law partnerships, and accounting firms, may bring hostile workplace claims against parties with whom they contract.

Amici Curiae Br. 1-2. Add to this the large number of workers who identify themselves as independent contractors, at 6.7% and growing (*see* Pet. 22; *Amici Curiae* Br. 7-8), and it becomes clear that the national significance of the issue by itself warrants review.

3. Respondents start their opposition brief unconventionally with § 1981's "legislative history," arguing (Resp. 4) that it "is important to understanding why the Court of Appeals' decision was correct and need not be reviewed." Even the broadest conception of this interpretive tool, however, has never supplied an explanation for sidestepping review of a lower-court decision. Nor at any rate does the legislative history begin to do what respondents say it does. It fails to show that Congress as a collective body, or even as represented by one individual member, thought that the 1991 amendments to § 1981 would apply to hostile-workplace claims brought by independent contractors. Indeed, the reports and floor speeches all suggest the opposite. Time after time, they repeat that the 1991 amendments extend the statute to hostile-workplace claims brought by "employees" while saying not a word about doing the same for independent contractors.

(Pet. 14-15). Respondents also fail to offer any explanation why Congress would make such a significant change in the law without "mention[ing] it at some point in the unusually extensive legislative history." *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991).

Instead of arguing that the National Legislature took up this specific issue during its statutory deliberations, respondents primarily claim that the general goals of the 1991 amendments cover this previously-unheard-of discrimination, proposing (Resp. 4) that the congressional record reveals that "the purpose" of § 1981 is "to protect *all persons* from racial discrimination." But this sort of attribution of congressional intent stretches the law, to say nothing of statutory interpretation, to the breaking point. It is difficult to believe that any such characterization of congressional purpose, even if it existed, could ever so transform a statute. Because "it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed," *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78 (1998), "generalized references to the 'remedial purposes' of the [statute] will not justify reading a provision more broadly than its language and the statutory scheme reasonably permit." *Aaron v. SEC*, 446 U.S. 680, 695 (1980) (quotations and citations omitted).

4. Also unpersuasive is the contention (Resp. 5-6) that the 1991 amendments, because they respond to *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989), must have been designed to reach these claims. But by extending an employee-related theory of liability (hostile-workplace claims) to § 1981 and by doing so through the employee-centric terms of Title VII, Congress did no such thing. One does not adopt an expanded theory of liability by "borrow[ing] terms" from a self-confining statute, which should "be taken as satisfaction with widely accepted definitions, not as a departure from them." *Morissette v. United States*, 342 U.S. 246, 263 (1952).

See Agency Holding Corp. v. Malley-Duff & Assocs., 483 U.S. 143, 152 (1987) (a statute patterned after a separate, pre-existing provision carries the limitations of the borrowed statute with it).

5. For like reasons, respondents' fleeting references (Resp. 9-11) to the language of § 1981 undermine rather than advance their cause. The terms of the statute say nothing about hostile work environment claims by independent contractors. And the only reason § 1981 has any application to hostile-workplace claims at all stems from the importation of Title VII terminology into the provision, a linguistic heritage that as shown considerably shortens rather than lengthens the statute's reach. Respondents simply do not come to terms with this point, and nowhere respond to the authority cited in the petition (Pet. 10-11) that supports it.

6. Nor do respondents satisfactorily explain (Resp. 15-17) why the time-honored distinction between independent contractors and employees does not point in the same direction. It is no response simply so say (Resp. 16) that, if true, this means that "independent contractors are unprotected by all of § 1981." Respondents know better. Independent contractors may bring claims for improper termination of a contract on grounds of race discrimination, and in point of fact that is just what respondents did in this case. Rather, the tradition of "differential treatment" between employees and independent contractors, *O'Hare Truck Serv., Inc. v. City of Northlake*, 518 U.S. 712, 721-22 (1996), of which Congress was fully aware in 1991 and long before (Pet. 13-14), amplifies why Congress would not lightly conflate an employee-centered theory of legal liability with independent contractor status. In overlooking these long-recognized distinctions, respondents fail to deal with the fact that it is the subordinate nature of an employee's relationship with an employer and the employee's lack of independence that are the very enabling features that allow a hostile work environment to exist.

7. Far from "leav[ing] all independent contractors vulnerable to racial discrimination in their workplaces without recourse" (Resp. 17), this reading respects the language that Congress enacted while leaving intact an ample variety of race-discrimination remedies. Consider the options still available to independent contractors: (1) Under § 1981, they may still seek relief for improper termination of the contract, as respondents did here; (2) under Title VII, they may still seek relief when the necessary qualities of control exist between the two businesses (*see* Pet. 19), such that they are independent contractors in name but employees in fact and therefore eligible to vindicate their employee rights to "emotional and psychological stability" in the workplace, *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971); and (3) under State law, they may still seek relief under a spectrum of civil and criminal laws designed precisely to remedy such harassment. Only a dysfunctional marriage of independent contractors and hostile-workplace claims is removed with this reading, a development as consistent with the language of the statute as with common sense.

8. Respondents offer no rejoinder to the contention (Pet. 16) that their interpretation, if accepted, would raise serious Thirteenth Amendment questions—namely, whether § 1981 could still fairly be characterized as legitimate enforcement legislation under this broad application, particularly as applied to corporations and other independent contractors that most assuredly were not the beneficiaries of the Thirteenth Amendment. This extension of § 1981, by itself, warrants review. *See United Brotherhood of Carpenters and Joiners of Am. v. Anderson*, 119 S. Ct. 1495 (granting petition on question of constitutional authority for § 1981), *cert. dismissed*, 119 S. Ct. 2418 (1999); Pet. 16-17.

9. Nor do respondents offer any meaningful assurances about the administration of this sudden innovation, to say nothing of quieting concerns about the litigation-driven

confusion that will spring from it. Except to say that the application of § 1981 to *employee* hostile-workplace claims has not created problems (Resp. 18), they offer no explanation how the elements and defenses of a hostile-workplace claim will apply in the unique setting of a non-controlling, non-subordinate relationship. For example, they do not explain how corporate claimants will be able to show that a work environment is *objectively* hostile because it involves "an environment that a reasonable person would find hostile or abusive," *Harris v. Forklift Systems*, 510 U.S. 17, 21 (1993), or is *subjectively* hostile because the victim "perceive[s] the environment to be abusive," *id.* at 21-22. They do not explain how this theory will ever cover individual claimants, who either will not be the contracting party (as here) or will already have a Title VII claim available to them if the kind of control and subordinate status that make a workplace actionable are found to exist. *See generally Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 323-24 (1992). And they do not explain how the defenses to this theory—the existence of meaningful preventive and corrective procedures (*see* Pet. 17-18)—could ever realistically apply to corporate or individual defendants, who until now have never had reason to make their workplace rules and complaint procedures available to every vendor with whom they do business. The currency of hostile-workplace inquiries simply does not readily convert, if it converts at all, to the independent-contractor setting.

10. Respondents do no better in trying (Resp. 20-25) to explain away the lower-court confusion over a corporation's standing to assert such claims. *See* Pet. 19-21. Respondents initially say (Resp. 21 n.9) that the question was a "non-issue" below, which is not quite true and irrelevant to boot. Wal-Mart did challenge standing in its petition for rehearing, which after all was the first occasion it had to respond to a court of appeals' interpretation that itself raised many of these issues. At all events, standing questions may be raised at any stage in the litigation, indeed even after briefing and on the eve of oral

argument. *See, e.g., Vermont Agency of Natural Resources v. United States, ex rel. Stevens*, No. 98-1828, 1999 WL 1045146 (U.S. Nov. 19, 1999). *See also National Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994) (standing is "a jurisdictional requirement which remains open to review at all stages of the litigation").

Nor do respondents dispel the confusion that has arisen on this issue—first and foremost because a statement from this Court on the point has not been disavowed. "[A] corporation," the Court has said unequivocally, "has no racial identity and cannot be the direct target of . . . racial discrimination." *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 263 (1977). Even the lower courts that have disagreed with this view have expressed unease in doing so—with one saying, for example, that the "argument that corporations cannot be subjected to slavery and cannot have races and thus cannot be covered by the Thirteenth Amendment and § 1981 has a good deal of force." *Howard Sec. Servs. v. Johns Hopkins Hosp.*, 516 F. Supp. 508, 512-13 (D. Md. 1981). Many of the other lower courts failing to follow *Village of Arlington Heights* have articulated distinct grounds, and tests, for doing so. In *Hudson Valley Freedom Theater, Inc. v. Heimbach*, 671 F.2d 702 (2d Cir. 1982), the Second Circuit concluded that the plaintiff had a racial identity because the non-profit corporation had "the very purpose of advancing minority interests, whereas for [the *Arlington Heights* corporation] this was simply an incidental, although important, by-product." *Id.* at 706. Yet other courts have recognized a racial identity, and § 1981 standing, because of the race of the company's owner or its management. *See e.g., Rosales v. AT&T Info. Sys., Inc.*, 702 F. Supp. 1489, 1494 (D. Colo. 1988); *Howard*, 516 F. Supp. at 513; *T & S Serv. Assocs. v. Crenson*, 505 F. Supp. 938, 943 (D.R.I.), *vacated on other grounds*, 666 F.2d 711 (1st Cir. 1981).

While it should be enough to show a conflict warranting review that the First Circuit's decision diverges from *Village of Arlington Heights*, respondents fail to rebut the showing that the conflict is more extensive than that. Respondents simply mischaracterize *Hotel St. George Assocs. v. Morgenstern*, 819 F. Supp. 310, 318-19 & n. 7 (S.D.N.Y. 1993), which clearly held that plaintiff could not assert the rights of its residents under § 1981 because "a litigant must assert his own legal rights and interests." (Citation and quotation omitted). And *Clifton Terrace Assocs., Ltd. v. United Tech. Corp.*, 929 F.2d 714, 721 (D.C. Cir. 1991), concluded that § 1981 standing was available only for the "direct victims" of discrimination, namely the tenants of the housing complex, not the corporation that owned it. While the court ultimately considered the case of the tenants and found that they had not made out a *prima facie* case, *id.* at 722, that hardly makes the court's necessary preliminary decision "*dicta*." (*See* Resp. 23). Removing any doubt on this score while simultaneously disposing of respondents' claim that the D.C. Circuit now supports the First Circuit's view, *see Gersman v. Group Health Ass'n*, 931 F.2d 1565 (D.C. Cir. 1991), *vacated on other grounds*, 502 U.S. 1068 (1992), *reinstated*, 975 F.2d 886 (D.C. Cir. 1992), *cert. denied*, 511 U.S. 1068 (1994), a later decision of the circuit has continued to embrace *Clifton Terrace*. *See Fair Employment Council v. BMC Marketing Corp.*, 28 F.3d 1268, 1278-80 & n. 4 (D.C. Cir. 1994).

Respondents also err in making the aside (Resp. 21 n. 9) that the Court has already resolved the problem at hand. *Barrows v. Jackson*, 346 U.S. 249 (1953), was not a § 1981 case, and simply allowed a plaintiff to proceed on a theory of third-party standing in challenging a restrictive covenant. And *Sullivan v. Little Huntington Park, Inc.*, 396 U.S. 229 (1969), involved a § 1982 plaintiff who was actually a party to the contract at issue and accordingly suffered his own injury. In the final analysis, the inter-court confusion, together with the failure of

many courts to follow *Village of Arlington Heights*, warrants immediate review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

ROBERT K. RHOADS
RANAE BARTLETT
WAL-MART STORES, INC.
702 S.W. 8th Street
Bentonville, Arkansas 72716
(501) 273-4505

JEFFREY S. SUTTON
Counsel of Record
JONES, DAY, REAVIS & POGUE
1900 Huntington Center
41 South High Street
Columbus, Ohio 43215
(614) 469-3855

MELANIE P. SARWAL
JONES, DAY, REAVIS & POGUE
2727 N. Harwood Street
Dallas, Texas 75201
(214) 220-3939

Counsel for Petitioner

November 1999